

**COMMONWEALTH OF KENTUCKY**

**BEFORE THE KENTUCKY PUBLIC SERVICE COMMISSION**

**RECEIVED**

MAR 05 2004

In the Matter of:

PETITION OF NPCR, INC.  
D/B/A NEXTEL PARTNERS  
FOR DESIGNATION AS  
AN ELIGIBLE TELECOMMUNICATIONS  
CARRIER IN THE  
COMMONWEALTH OF KENTUCKY

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CASE NO. 2003-00143

PUBLIC SERVICE  
COMMISSION

**COMMENTS OF THE TDS TELECOM COMPANIES**

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**COMMENTS**

TDS Telecommunications, Inc. ("TDS Telecom"), parent company of Lewisport Telephone Company ("Lewisport Telephone"), files these comments to urge the Kentucky Public Service Commission (Commission) to delay consideration of the petition of NPCR, Inc. d/b/a Nextel Partners ("Nextel") for designation as an eligible telecommunications carrier ("ETC") in the Lewisport Telephone service area<sup>1</sup> as well as the service areas of the other rural telephone companies identified in the Petition until after the Federal Communications Commission (FCC) has resolved the ETC designation issues currently pending before the Federal-State Joint Board on Universal Service ("Joint Board"). Significant issues concerning the ETC designation process and its impact on the viability of the Universal Service Fund ("Fund") currently are pending before the Federal-State Joint Board on Universal Service ("Joint Board"). Although the FCC recently granted ETC designation to a cellular carrier serving rural

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<sup>1</sup> Kentucky Public Service Commission *Seeks Comment on NPCR, Inc. d/b/a Nextel Partners for Designation as an Eligible Telecommunications Carrier in the State of Kentucky*, Case No. 2003-00143.

areas in Virginia,<sup>2</sup> in comments filed before the FCC in the matter of Nextel's request for ETC designation in Florida, TDS Telecom agreed with Commissioner Martin's dissenting opinion that the FCC should refrain from granting petitions for competitive ETC designation in rural areas until the issues before the Joint Board have been resolved. In the matter before this Commission, TDS Telecom urges the Commission to refrain from ruling on Nextel's ETC designation until the FCC resolves the issues surrounding the designation of ETCs and its impact on universal service. If the Commission determines this issue is ripe for a decision now, TDS Telecom believes the Commission should at a minimum take into consideration the guidelines set forth in the FCC Virginia Cellular Order whereby the FCC concluded that the value of increased competition, by itself, is not sufficient to satisfy the Telecom Act's public interest test in rural areas. The FCC listed five (5) factors it will consider in evaluating future ETC requests. These factors are (1) the benefits of increased competitive choice, (2) the impact of multiple designations on the universal service fund, (3) the unique advantages and disadvantages of the competitor's service offering, (4) any commitments made regarding quality of telephone service provided by competing providers, and (5) the competitive ETC's ability to provide the supported services throughout the designated service area within a reasonable time frame. Furthermore, if the FCC was to adopt the recent Federal-State Joint Board recommendation to limit USF support to the primary line, the Commission must consider the public policy issues concerning the portability of support and the potential impact on local rates in rural areas when more than one carrier is designated an ETC in a given area. If the Commission finds it necessary to rule on this

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<sup>2</sup> See *Virginia Cellular, LLC Petition for Designation as an Eligible Telecommunications Carrier in the Commonwealth of Virginia*, CC Docket No. 96-45, Memorandum Opinion and Order, FCC 03-338 (rel. Jan. 22, 2004) ("*Virginia Cellular*").

matter prior to resolution of the issues before the FCC, the Commission should deny the petition because it fails to satisfy the requirements set forth by the FCC in *Virginia Cellular*.

## I. INTRODUCTION AND SUMMARY

The *Nextel Petition* seeks ETC designation in certain rural and non-rural telephone service areas in the State of Kentucky. Nextel contends that it should be granted ETC designation because (1) it offers or will offer the nine services and functionalities required under Section 54.101(a) of the Commission's Rules and (2) the public interest would be served by affording universal service support to a wireless carrier offering "a valuable alternative to the existing telecommunications regime" in rural areas.<sup>3</sup> The *Nextel Petition* also claims that granting Nextel ETC status would serve the public interest by allowing Nextel to "enhance and expand its network infrastructure to better serve consumers in underserved, high-cost areas of the State of Kentucky," by enabling Nextel "to compete with other carriers on a level regulatory playing field," and by "further promoting the extensive role Nextel Partners plays in the provision of communications services to Kentucky public schools, libraries and local, state and federal government agencies."<sup>4</sup>

Through its operating company subsidiaries, including Lewisport Telephone, TDS Telecom provides high quality, reliable, locally based telecommunications services to 900 rural and suburban communities in 29 states. TDS Telecom is part of the Telephone and Data Systems, Inc. family of companies with more than one million access line equivalents, of which Lewisport Telephone Company represents approximately 1,493 access lines. TDS Telecom

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<sup>3</sup> *Nextel Petition* at 6-7.

<sup>4</sup> *Id.* at 7.

offers local and long distance voice and high-speed data services and products in both the residential and business markets in its service territories. TDS Telecom emphasizes reliability and customer service, and is consistently favorably rated by third-party evaluators for its high quality customer service. In Kentucky, TDS Telecom provides local exchange service through its Lewisport Telephone, Leslie County Telephone, and Salem Telephone subsidiaries.

TDS Telecom urges the Commission to delay consideration of the *Nextel Petition* until after the FCC has resolved the competitive ETC designation and support issues currently pending before the Joint Board. The FCC has recognized the need to reevaluate the ETC designation process to ensure that it appropriately balances the FCC's overriding goals of promoting competition in telecommunications services while ensuring universal service to all Americans. Commenters have raised strong concerns about the designation of competitive ETCs in rural areas, where universal service by necessity is (or should be) the paramount goal, and about the overall impact of such designations on the Universal Service Fund. Rather than decide this and other ETC designation petitions on a piecemeal basis while the Joint Board is undertaking its analysis, the Commission should allow the FCC to address and resolve the legitimate concerns raised in the ongoing FCC proceeding before it attempts to determine (as required by the statute) whether or not the public interest would be served by designating Nextel as a competitive ETC in the rural telephone service areas in Kentucky.

If the Commission believes it is necessary to rule on Nextel's Petition at this time, the Commission should find, consistent with the "framework" enunciated in the FCC *Virginia Cellular* order, that Nextel has failed to demonstrate that the public interest would be served by designating Nextel a competitive ETC in the specified Kentucky rural service areas. Nextel's vague assertions about the value of its mobile services and its willingness to comply with

“applicable law” upon designation as an ETC do not rise to the public interest showing demanded in *Virginia Cellular*.

**II. THE COMMISSION SHOULD NOT GRANT NEXTEL ELIGIBLE  
TELECOMMUNICATIONS CARRIER STATUS WHILE SIGNIFICANT ETC  
DESIGNATION ISSUES ARE PENDING BEFORE THE JOINT BOARD.**

On February 7, 2003, pursuant to the FCC’s Referral Order of November 8, 2002, the Joint Board released a public notice requesting comment on the rules relating to High-Cost universal service support and the criteria and procedures for designating ETCs (“*High Cost/ETC Notice*”).<sup>5</sup> A number of comments filed in response to the *High Cost/ETC Notice* urged the FCC to modify the criteria used in designating ETCs, particularly in rural service areas.

Several commenters urged the FCC to adopt specific criteria to give effect to the statutory requirement that any grant of competitive ETC designation in a rural service area be supported by a finding that the public interest would be served thereby.<sup>6</sup> Commenters argued that the public interest criteria should balance the costs and benefits of a proposed ETC designation to maximize the benefits of federal funding, taking into account the fact that when

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<sup>5</sup> *Federal-State Joint Board on Universal Service Seeks Comment on Certain of The Commission’s Rules Relating to High-Cost Universal Service Support and The ETC Designation Process*, CC Docket No. 96-45, Public Notice, FCC 03J-1 (rel. Feb. 7, 2003).

<sup>6</sup> Section 214(e)(2) of the Communications Act, 47 U.S.C. § 214(e)(2), imposes different standards for designating ETCs in rural as compared to non-rural areas. In non-rural areas, a state commission or the Commission is obligated to grant ETC status to any petitioner demonstrating that it can meet the requirements of Section 214(e)(1). In rural areas, on the other hand, regulators have the *discretion* to grant ETC status in an area served by a rural telephone company *only* upon a finding that the public interest would be served thereby. Although some ETC designation orders have suggested that promoting competition alone is sufficient to serve the public interest, Congress clearly intended that factors other than promoting local exchange competition be taken into account in determining whether to grant ETC status to petitioners serving rural areas. The National Telecommunications Cooperative Association (“NTCA”) comments on the *High Cost/ETC Notice* note that where the Commission and states treat competition as “the preeminent goal to be promoted at the expense of all others,” the public interest requirement is effectively read out of the statute. See National Telecommunications Cooperative Association Comments in CC Docket No. 96-45 (May 5, 2003) (“NTCA Comments”).

multiple competitors are subsidized in a rural area that cannot support multiple carriers, the incumbent ETC may be unable to achieve the economies of scale necessary to serve satisfactorily all the customers in the area.<sup>7</sup> Commenters thus urged the FCC to adopt a public interest test for competitive ETC designation that weighs any advantages to be derived from supporting a competitive entrant against the potential adverse effects on affordability and promotion of advanced services throughout the service area.<sup>8</sup> Commenters also insisted that the public interest test should require a determination that the competitive ETC will actually provide universal service throughout the service area, in accordance with the same service quality standards imposed on incumbents, and will use support received from the Universal Service Fund for its intended purposes.<sup>9</sup>

Commenters also expressed concerns about the overall impact on the Universal Service Fund of designating multiple ETCs in high-cost areas. Some commenters projected that if the current ETC designation practices remain in effect, the demands on the High-Cost Fund will soon grow to an unsustainable level.<sup>10</sup> In light of these concerns, commenters specifically questioned the appropriateness of granting ETC status to established, national commercial mobile radio service ("CMRS") providers, such as Nextel, that would receive windfall subsidies for their service while substantially increasing the burdens on the Universal Service Fund.<sup>11</sup>

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<sup>7</sup> See Comments of Organization for the Promotion and Advancement of Small Telecommunications Companies in CC Docket No. 96-45, at 41 (May 5, 2003) ("OPASTCO Comments"); NTCA Comments at 21-22.

<sup>8</sup> NTCA Comments at 20-23.

<sup>9</sup> OPASTCO Comments at 44-46.

<sup>10</sup> See OPASTCO Comments at 10; Comments of Rural Independent Competitive Alliance in CC Docket No. 96-45, at 11 (May 5, 2003).

<sup>11</sup> See NTCA Comments at 23-24.



The Commission would be wise to await resolution of these issues, which are specifically implicated in the *Nextel Petition*, before making a decision on Nextel's request for ETC designation in rural Kentucky service areas. Otherwise, the Commission risks making a decision that ultimately could be inconsistent with what the Joint Board and the FCC determine the public interest requires.<sup>12</sup> Although the FCC recently signaled an intention to address at least some ETC designation petitions while the Joint Board is still considering the proper public interest criteria to be used in evaluating those petitions,<sup>13</sup> TDS Telecom agrees with Commissioner Martin that this is not the right approach, in part because it risks pre-judging the on-going work of the Joint Board on these issues.<sup>14</sup>

Making a decision on the *Nextel Petition* before the Joint Board completes its work would be particularly ill-advised in light of the unique concerns the *Nextel Petition* raises about the overall impact of competitive ETC designations on the Universal Service Fund. In *Virginia Cellular*, the FCC found, without elaboration, that the grant of ETC designation to Virginia Cellular, a regional carrier, would not "dramatically burden" the Universal Service Fund.<sup>15</sup> However, the FCC did express "increasing concern" about the impact on the Universal Service Fund of the rapid growth in high-cost support distributed to competitive ETCs, and noted

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<sup>12</sup> To the extent that the Commission's decision on the pending issues adopts public interest criteria that Nextel does not satisfy, and Nextel as a result loses its ETC designation in the Florida service areas (a possibility contemplated in the comments of the National Association of State Utility Consumer Advocates on the *High Cost/ETC Notice*), the public would be harmed by the resulting service disruption if the carrier were to pull out of the rural market after losing ETC status.

<sup>13</sup> *Virginia Cellular* at ¶ 4 (stating that the decision enunciates a framework that will apply to "all ETC designations for rural areas pending further action by the Commission").

<sup>14</sup> *Virginia Cellular*, Dissenting Statement of Commissioner Kevin J. Martin at 2.

<sup>15</sup> *Virginia Cellular* at ¶ 31.

that these issues are currently being addressed by the Joint Board.<sup>16</sup> The FCC expressed the “hope that the . . . pending rulemaking proceeding . . . will provide a framework for assessing the overall impact of competitive ETC designations on the universal service mechanisms.”<sup>17</sup> In the absence of such a framework, the FCC or the Kentucky Commission cannot effectively determine whether the public interest as a whole will be served by granting competitive ETC designation to Nextel, an established national carrier that has sought ETC designation in a number of service areas across the country. As OPASTCO has noted, if a petition for ETC designation by a large, multi-state CMRS provider such as Nextel were granted, other CMRS providers would feel compelled to seek ETC designation as well to remain competitive.<sup>18</sup> This could result in a large-scale increase in the size of the Universal Service Fund – more than \$2 billion annually if all wireless carriers nationwide were granted ETC status.<sup>19</sup> The FCC has acknowledged both that (1) this potential impact must be taken into account in determining whether the public interest would be served by designating a competitive ETC in a rural telephone company’s service area,<sup>20</sup> and (2) the pending rulemaking will provide the framework for analyzing that impact.<sup>21</sup> Accordingly, the Kentucky Commission should wait resolution of

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<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> See OPASTCO Comments on Nextel Partners Petition for Designation as an Eligible Telecommunications Carrier in the State of Tennessee, CC Docket No. 96-45, at 2-3 (Jan. 9, 2004).

<sup>19</sup> *Id.* at 3.

<sup>20</sup> *Virginia Cellular* at ¶ 28 (“In determining whether designation of a competitive ETC in a rural telephone company’s service area is in the public interest, we weigh the benefits of increased competitive choice, *the impact of the designation on the universal service fund*, the unique advantages and disadvantages of the competitor’s service offering, any commitments made regarding quality of telephone service, and the competitive ETC’s ability to satisfy its obligation to serve the designated service areas within a reasonable time frame.”) (emphasis added).

<sup>21</sup> *Id.* at ¶ 31.

the pending rulemaking before considering whether the public interest would be served by granting the *Nextel Petition*.

### III. NEXTEL DOES NOT MAKE THE REQUIRED PUBLIC INTEREST SHOWING.

If the Commission decides to address the *Nextel Petition* before resolution of the pending ETC designation issues, it should do so under the public interest framework enunciated in *Virginia Cellular*.<sup>22</sup> That is, the Commission must “weigh the benefits of increased competitive choice, the impact of the designation on the universal service fund, the unique advantages and disadvantages of the competitor’s service offering, any commitments made regarding quality of telephone service, and the competitive ETC’s ability to satisfy its obligation to serve the designated service areas within a reasonable time frame.”<sup>23</sup> Under this standard, as applied in *Virginia Cellular*, the claims made in the *Nextel Petition* do not support a finding that the public interest would be served by granting the requested ETC designation.

First, Nextel has not provided any details to support its bald assertions that the competitive choice it offers would bring unique or significant benefits to subscribers in the Rural

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<sup>22</sup> Without even reaching the public interest standard, the Commission could find, as did the Minnesota Public Utilities Commission in a recent order, that Nextel has failed even to demonstrate that it provides the services required of an ETC under Section 214(e) of the Communications Act. On December 1, 2003, the Minnesota Commission denied Nextel’s petition for ETC designation in certain rural areas in Minnesota because Nextel had not provided sufficient evidence that it would serve the entire area for which it sought support and had not demonstrated specific plans to advertise the availability of the supported services throughout the proposed service area. *NPCR, Inc. d/b/a Nextel Partners for Designation as an Eligible Telecommunications Carrier Under 47 U.S.C. § 214(e)(2)*, Order Denying Without Prejudice Nextel’s Application for ETC Designation, Docket No. PT-6200/M-03-647 (MN PUC Dec. 1, 2003). The *Nextel Petition* is similarly devoid of specifics in this regard. The Minnesota Commission also noted that Nextel had refused to offer a specific universal service offering, as distinguished from its other offerings, at an “affordable” rate. The Minnesota Commission expressed the opinion that a competitive ETC’s offering of an affordable universal service package would be relevant to the public interest inquiry required under Section 214(e)(2) of the statute. Nextel has not committed to offer or advertise an affordable universal service package in Florida.

<sup>23</sup> *Virginia Cellular* at ¶ 28.

ILECs' service areas. Nextel states that its service will offer "a larger calling area" (although it does not state whether this larger calling area will be provided at rates comparable to the ILECs' local service rates); "the benefits of mobile telephony" (which are not explained); GPS location assistance for 911 calls "where requested by the PSAP" (without stating whether any PSAPs in the designated rural service areas have requested such assistance); and a competitive incentive to incumbent LECs to improve their existing networks (without examining the question of whether the dilution of the ILECs' universal service support would reduce the resources available to make such improvements).<sup>24</sup> Nextel has not committed to serve residents to the extent they do not have access to the public switched telephone network through the ILEC or stated an intention to provide wireless telecommunications services to geographically isolated residents.<sup>25</sup> Nor has Nextel provided evidence that residents of the rural areas it seeks to serve would benefit from mobile telephone service because they drive long distances to work, school or stores.

Although Nextel has acknowledged some of the unique *disadvantages* of wireless service, including the fact that "[w]ireless service is inherently affected by conditions unique to wireless service and which conditions do not affect wireline service providers," such as "[g]eography, atmospheric conditions and man-made radiofrequency and physical structure interference" that may reduce a wireless carrier's coverage area,<sup>26</sup> it has not offered to mitigate concerns about coverage area or dropped calls by "using universal service support to build new

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<sup>24</sup>     *Nextel Petition* at 6.

<sup>25</sup>     *See Virginia Cellular* at ¶ 29.

<sup>26</sup>     *Nextel Petition* at 5 n.7.

towers and facilities to offer better coverage.”<sup>27</sup> Instead, Nextel commits only to “respond to” requests for service in the Kentucky service areas, and then indicates (by citing in a footnote the potential factors that could limit its coverage area) that it will not in fact provide service in response to all such requests.<sup>28</sup> Nextel also does not commit to comply with the Cellular Telecommunications Industry Association Consumer Code for Wireless Service, to provide the Commission with information about consumer complaints it receives in the Kentucky service areas, or to take any other steps to ensure the quality of its service.<sup>29</sup>

Finally, the *Nextel Petition* fails to address at all the question of the overall impact of Nextel’s designation as a competitive ETC on the Universal Service Fund. As noted above, this impact could be significant and harmful to the public interest. If the Universal Service Fund is depleted by support paid to competitive carriers, consumers could face higher universal service contributions *and* higher local service rates (and less satisfactory service) if support levels are reduced. Nextel has not demonstrated that its designation as a competitive ETC would offer benefits sufficient to overcome these costs.

#### IV. CONCLUSION

Parties commenting in the pending Joint Board proceeding have raised legitimate and significant concerns about the public interest implications of granting ETC designation to entities like Nextel seeking support for services offered in rural telephone companies’ service

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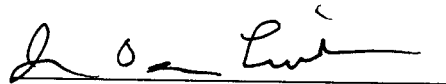
<sup>27</sup> *Virginia Cellular* at ¶ 30. Instead, Nextel suggests that it will use universal service support to expand its role in providing communications service to public schools, libraries and government agencies. But there is no indication that these entities are in high-cost or rural areas or otherwise are the intended beneficiaries of high-cost universal service funding.

<sup>28</sup> *Nextel Petition* at 5.

<sup>29</sup> *Virginia Cellular* at ¶ 30.

areas. The public interest demands that the Kentucky Commission delay any decision on the *Nextel Petition* until these pending issues are resolved. If the Kentucky Commission decides to rule on the merits of the *Nextel Petition* now, it should find that Nextel has not made a meaningful showing that the public interest would be served by grant of the petition.

Respectfully submitted,



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## CERTIFICATE OF SERVICE

I, James Dean Liebman, do hereby certify that I have this 9th day of MARCH, 2004, mailed a true and complete copy of the foregoing Comments to each of the following:

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